Supreme Court, U. S.
FILED
MAR 30 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-1102.

RENO ANTONIOLI and ALBERT GIST, Individually and on Behalf of Others Adversely Affected

and

THE SOUTH JERSEY TEXAS EMPLOYEES ASSOCIATION,

Petitioners,

v.

LEHIGH COAL AND NAVIGATION COMPANY and LEHIGH & NEW ENGLAND RAILROAD, LEHIGH & NEW ENGLAND RAILWAY, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Court of Appeals (Appendix to Petition, 1a-14a) is not yet reported. The opinion of the District Court (Appendix to Petition, 15a-32a) is unreported. The opinion of the Court of Appeals in the prior case, *Clemens v. Central Railroad Company of New Jersey*, is reported at 399 F. 2d 825 (3d Cir. 1968), *cert. denied*, 393 U. S. 1023 (1969). The opinion of the Court of Appeals in the prior case, *Roberts v. Lehigh and New England Railway*, is reported at 323 F. 2d 219 (3d Cir. 1963).

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

1. Are issues the proper subject of review by this Court where those issues were never raised, briefed, or argued below, and where petitioners have not presented exceptional circumstances which might justify this Court's review of issues not raised below?

2. Was not the Court of Appeals correct in affirming the District Court's handling of the class action?

3. Was not the Court of Appeals correct in affirming the District Court's decision that petitioners' claims are time barred?

4. Should this Court exercise its discretion in favor of granting review on a writ of certiorari where:

(a) the decision of the Court of Appeals was not in conflict with a decision of another court of appeals on the same matter;

(b) the Court of Appeals has decided no question of federal law which has not already been settled by this Court;

(c) the decision of the Court of Appeals is in no way in conflict with an applicable decision of this Court; and

(d) there is not the slightest suggestion that the Court of Appeals or District Court departed in any way from the usual and accepted course of judicial proceedings?

COUNTER-STATEMENT OF STATUTES INVOLVED.

(1) Section 5(2)(f) of the Interstate Commerce Act, 49 U. S. C. § 5(2)(f), 54 Stat. 898, 906-907 (Appendix to Petition, 18a).

COUNTER-STATEMENT OF THE CASE.

On September 26, 1961, the Interstate Commerce Commission approved the abandonment by the Lehigh and New England Railroad Company (Railroad) of its trackage except for some forty miles the acquisition of which by defendant Lehigh and New England Railway Company (Railway) was concurrently approved. In approving the applications, the ICC prescribed the so-called "New Orleans" conditions for the payment of severance pay to employees affected by the abandonment.

In 1962, the same plaintiffs that comprise Count III of the complaint in the instant case, former employees of Railway, filed their first complaint in the prior case of *Roberts v. Lehigh and New England Railway Company*, 211 F. Supp. 379 (E. D. Pa. 1962), *aff'd.*, 323 F. 2d 219 (3d Cir. 1963). In that case, the plaintiffs complained of mandatory retirement agreements entered into between the Railway and certain brotherhoods. It was alleged that the

agreements were invalid and that the plaintiffs were wrongfully deprived of severance pay by reason of their retirements under the invalid agreements. The District Court upheld the validity of the retirement agreements and the Court of Appeals affirmed. *Id.*

In 1964, the plaintiffs represented in Count III instituted suit, accepting their retirement as final and seeking damages for breach of contract. By agreement, that suit was dismissed without prejudice.

In 1965, the plaintiffs represented in Count III instituted a third suit seeking the same damages as they had in the second suit, but raising a new theory alleging that their retirement agreements were illegal because they were in conflict with the 1961 order of the Interstate Commerce Commission. In August, 1968, the Court of Appeals below decided that plaintiffs' claims were barred by the doctrine of *res judicata*. *Clemens v. Central Railroad Company of New Jersey*, 399 F. 2d 825 (3d Cir. 1968), *cert. denied*, 393 U. S. 1023 (1969).

On November 4, 1968, Reno Antonioli, by his attorney, and on behalf of others adversely affected, filed Counts I and II of the instant suit. After *certiorari* was denied in *Clemens* on January 13, 1969 (393 U. S. 1023), Count III was added to the complaint by amendment.

Count I plaintiffs consist of a class of workers of the Railroad on the January, 1959 payroll who were furloughed prior to the effective date of the consolidation, November 1, 1961 (Appendix to Petition, 4a-5a). Plaintiffs in Count II consist of 22 former employees of Railroad who were retired at the time of the consolidation (Appendix to Petition, 7a). Count III consist of the plaintiffs in the earlier cases of *Roberts* and *Clemens, supra*. Plaintiffs in Counts I and II sought an injunction to compel arbitration of their claims for displacement and severance benefits under the ICC Protective Order.

On January 29, 1969, petitioners' motion for preliminary injunction was denied. On March 6, 1969, petitioners' motion for declaratory judgment in Counts I and II was denied.

On June 24, 1969, petitioners moved for Summary Judgment.[1]

On October 27, 1969, the District Court ordered that within sixty (60) days petitioners "must finish all discovery on the issue of whether this matter can be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure" and found at the expiration of said sixty (60) days petitioners "must specify precisely the class [they seek] to represent by reference to evidence developed in the discovery record in this case."

Subsequently, petitioners filed a brief in support of the class action under Rule 23 in which they stated that the petitioners in Count I numbered 569 persons; Count II "consisted of 22 men and Count III, 30 men". In conclusion, petitioners stated "that the requirements of Rule 23 have been met to institute this as a class action."[2]

On March 3, 1970, respondents filed their Motion for Summary Judgment.

On December 30, 1970, the District Court found as a matter of law that petitioners' claims in Counts I and II

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1. Petitioners' brief in support of summary judgment, filed on September 25, 1969, states *inter alia* "the disputes in Counts I and II are simply that some workers were furloughed in anticipation of the transaction approved by the ICC and hence deprived of displacement compensation, (Count I) and other workers were given less compensation than that ordered by the ICC Order of September 26, 1961 (Count II)". See also opinion below, footnote 6 (Appendix to Petition, 4a).

2. In a letter dated October 5, 1971, to the Court of Appeals, petitioners stated: "Count I consists of 528 people on the payroll of the carrier at the time of the merger . . . ." (Appendix to Petition, 4a, n. 4).

were "barred by time . . . whether the statute of limitations or the doctrine of laches is applied . . . because it would be inequitable to require defendants to defend against these claims" (Appendix to Petition, 26a). With respect to Count II, the District Court also granted respondents' motion for summary judgment because petitioners had knowingly waived their rights under the ICC Order by signing releases in exchange for lump sum severance benefits.[3]

On November 30, 1971, the Court of Appeals affirmed the Order of the District Court with respect to Counts I and II, and amended that Order to enter judgment for respondents on Count III (Appendix to Petition, 14a).

3. The District Court's order of December 30, 1970, permitted petitioners to amend their complaint to name a plaintiff representative of Count II. Albert Gist was subsequently added. (Appendix to Petition, 29a).

ARGUMENT.

I. All of the Questions for Review Relating to the Description of the Class and the Treatment of Its Members Were Not Raised, Briefed, or Argued in the Courts Below and Are Thus Barred From Consideration by This Court.

Petitioners present a variety of arguments in which they allege that the District Court erred in its management of this class action. Deferring for the moment consideration of the lack of merit in such arguments, this is the first mention of the "class action issues" petitioners now seek to present to this Court. Questions for review by this Court must have been urged and briefed in the courts below. *Neely v. Eby Construction Co.*, 386 U. S. 317, 330 (1967); *Lawn v. United States*, 355 U. S. 339, 362 n. 16 (1958); *California v. Taylor*, 353 U. S. 553, 572 n. 2 (1957). Neither the opinion of the District Court nor the opinion of the Court of Appeals even mentioned "class action issues".[4] Furthermore, it cannot seriously be contended that the present case presents such "exceptional" circumstances as would justify this Court's review of issues not raised below. See *Duignan v. United States*, 274 U. S. 195, 200 (1927), *and cases cited therein;* see, e.g., *Gutierrez v. Waterman S. S. Corp.*, 373 U. S. 206, 209 (1963); *Pollard v. United States*, 352 U. S. 354, 359 (1957). To permit petitioners to raise questions before this Court which were never considered below would renew and perpetuate litigation that by all rights should have been terminated at its inception.

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4. Even if one or both of the opinions of the courts below had mentioned or discussed the "class action" questions raised for the first time in this petition, review of those questions by this Court would still not be justified. See, e.g., *Tyrrell v. District of Columbia*, 243 U. S. 1, 4 (1917).

II. The Actions of the Courts Below in Defining the Class and Dealing With Its Members Were Correct and in No Way Violated Due Process of Law.

Even if petitioners had raised their "class action" arguments in the courts below, those arguments are without merit and do not warrant review by this Court.

Petitioners were afforded ample opportunity to clarify or add to the class by amending their pleadings. More than one year prior to the District Court's granting of a summary judgment, they were ordered to complete discovery and specify precisely the class they sought to represent. Furthermore, petitioners have no standing to complain of any delays in the preliminary class action determinations since they themselves moved for summary judgment. There is no suggestion of prejudice to, or inadequate representation of, the members of the class.

Nowhere do the petitioners allege that the representation by the named parties of the interests of the absent parties was in any way inadequate. Where the members of the class were represented by competent counsel and where the outcome of the case depended solely upon questions of law which were fully considered by both of the courts below, it cannot credibly be argued that the interests of those absent members of the class were not adequately protected.

Petitioners also argue that the final order of the District Court failed to "describe those whom the courts found to be members of the class" (Petition at 8). It suffices to say that examination of record before the District Court, its opinion, and its order show quite clearly those whom the court found to be members of the class. The Court of Appeals certainly found no deficiency in the description of the class (Appendix to Petition, 4a-5a). And, according to their answers to Interrogatories, Briefs, and Correspond-

ence with the Court of Appeals, neither did the petitioners (Appendix to Petition, 4a-5a, nn. 4-7).

The notion that certain employees were prejudiced by being excluded from the class is fallacious. No legal theories to support a cause of action in favor of those employees were ever forthcoming (Appendix to Petition, 4a, n. 6). And, more significantly, had those employees been covered by the District Court's order, they would not simply have been delayed in pursuing their purported causes of action, but would have been, as a matter of law, absolutely foreclosed from doing so by the Court's summary judgment. In addition, not only did petitioners fail to raise this argument in the courts below, they unequivocably abandoned it by letters to the Court of Appeals (Appendix to Petition, 4a, n. 4) and to opposing counsel. By letter dated May 3, 1971, Lawrence J. Richette, counsel for petitioners, stated *inter alia*, that: "I have abandoned all of my Motions subsequent to the Judge's Order of December 30, 1970" (Respondents' Appendix, 1a). The motions abandoned included, among others, petitioners' motion to take depositions as well as their request to file an amended complaint after the time set by the Court for doing so had expired.

The record leaves no doubt that the District Court's definition of the class was proper and that its members were adequately represented.

III. It Was Proper to Look to the State Statute of Limitations in Determining Whether the Claims Were Time Barred.

The Courts below were entirely correct in holding that:

> "It would be inequitable to require defendants to defend against these claims, most of which involve

facts even more than six (6) years old, at this late date."[5]

Petitioners' effort to gain review based on an alleged erroneous application of the Pennsylvania Statute of Limitations is without merit since the courts below followed the mandate of this Court and merely looked to the statute as "relevant in determining whether they [petitioners] have inexcusably slept on their rights" (Appendix to Petition, 25a); *Holmberg v. Armbrecht,* 327 U. S. 392, 396 (1946); *Russell v. Todd,* 309 U. S. 280, 288-89 (1940).

IV. Since Petitioners Were Completely Affected as of the Date of Consolidation, Their Claims Accrued by That Date With Respect to Laches.

The courts below found that it would "be inequitable to require defendants to defend against [petitioners'] claims." (Appendix to Petition, 26a) Questions raised by petitioners with respect to when their cause of action arose are controlled by equitable considerations. In an equitable action, the date the cause of action arose must be considered in the context of the substantial period of time during which petitioners failed to assert any claim; and it is quite proper to use the Pennsylvania six year statute of limitations as a frame of reference in evaluating petitioners' unwarranted delay.

Moreover, in examining the time lapse in the instant case the Court of Appeals correctly concluded that any breach of duty by defendants occurred when petitioners were furloughed or retired. It was then that their equitable

5. The District Court went on to observe that, "It seems reasonably clear that this count [Count I] was included because counsel came across some facts and a theory while engaged in related litigation which were new ideas to him but which had actually been pursued by many of these employees immediately after the consolidation" (Appendix to Petition, 26a).

cause of action arose. Petitioners in Count I were allegedly furloughed prior to consolidation, November 1, 1961, and they knew then that their jobs were affected.. Petitioners in Count II were retired as of November 1, 1961, and they knew then their jobs were affected. The Courts below were correct in holding that the equitable period of limitations commenced to run when petitioners were affected. Since petitioners were totally affected on November 1, 1961 or prior thereto, the courts below properly concluded that it would be inequitable to suspend the operation of the equitable period of limitations for the protective period.

V. There Are No Circumstances Present Which Warrant This Court's Granting Review of Petitioners' Writ of Certiorari.

The considerations governing review on certiorari clearly militate in the present case against this Court's granting petitioners' writ of certiorari. No aspect of the decision of the Court of Appeals was in conflict with a decision of this Court nor was it in conflict with a decision of another court of appeals. The questions of federal law decided by the Court of Appeals have already been settled by the applicable decisions of the Court. And finally, the actions of both the District Court and Court of Appeals were in keeping with the highest standards of the judicial process. This is not a case in which review by this Court is necessary or warranted.

CONCLUSION.

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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RESPONDENTS' APPENDIX.

(Letterhead of)

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Re: Reno Antonioli, et al. vs. Lehigh Coal and Navigation Company, et al.

Gentlemen:

You will find enclosed the appellants' brief and appendix. You will note that the appendix is somewhat different from the original statement I mailed to you.

I have not enclosed the Summary Judgment Motion as I thought that was superfluous and further, I have abandoned all of my Motions subsequent to the Judge's Order of December 30, 1970.

Very truly yours,
L. J. RICHETTE.

LJR:mkd
Enc.